**ROBERT JOHN REEVES**

**v.**

**MENTERI SUMBER MANUSIA MALAYSIA & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R3-25-99-1998]
26 AUGUST 1999

***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Judicial review - Ministerial discretion - Section 20(3) Industrial Relations Act 1967 - Serious question of facts or law*

The applicant filed a complaint that he was unfairly dismissed by his employer to the 1st respondent. The 1st respondent however decided to exercise his discretion not to refer the applicant's representation to the Industrial Court for adjudication. Dissatisfied with the decision, the applicant filed an application for orders of *certiorari* and *mandamus*.

**Held:**

**[1]** The 1st respondent's decision not to refer the applicant's representation to the Industrial Court did not amount to an abuse of power, since, the 1st respondent's affidavit clearly showed that he had acted correctly and had not exceeded his jurisdiction in considering the relevant facts in arriving at the decision.

**[2]** A dispute of facts or of law *per se* is not a sufficient ground for the court to quash the Minister's decision not to refer a representation to the Industrial Court for adjudication. The facts must "point overwhelmingly in favour of a different version" and raise "serious question of facts or law calling for adjudication."

**[3]** The nature of the discretion vested in the 1st respondent under s. 20(3) Industrial Relations Act 1967 is a very subjective discretion which should not be readily impugned or questioned by the court.

*[Application dismissed.]*

**Case(s) referred to:**

*Associated Provincial Picture Houses Ltd v. Wednesbury Corpn [1948] 1 KB 223* ***(refd)***

*Express Newspapers Ltd v. Labour Court & Anor AIR [1964] SC 806* ***(refd)***

*Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665* ***(refd)***

*James v. Waltham Holy Cross UDC [1972] ICR 398* ***(foll)***

*KC Mathews v. Kumpulan Guthrie Sdn Bhd [1981] 1 CLJ 40b* ***(refd)***

*Khaliah Abbas v. Pesaka Capital Corpn Sdn Bhd [1997] 3 CLJ 827* ***(not foll)***

*Littlewoods Organisation Ltd v. Egenti [1976] ICR 516* ***(refd)***

*Michael Lee Fook Wah v. Minister of Human Resources Malaysia [1998] 1 CLJ 227* ***(refd)***

*Minister of Labour, Malaysia v. Chan Meng Yuan [1992] 2 MLJ 337* ***(foll)***

*Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103* ***(refd)***

*National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour & Manpower [1980] 2 MLJ 189* ***(foll)***

*R v. Independent Television Commission, ex p TSW Broadcasting Ltd [1996] JR 185* ***(refd)***

*Regina v. Boundary Commission for England, ex p Foot & Ors [1983] 1 QB 600* ***(refd)***

**Legislation referred to:**

Industrial Relations Act 1967, s. 20(1), (3)

*For the applicant - P Kuppusamy (KC Wong with him); M/s P Kuppusamy & Co*
*For the 1st respondent - Mahamad Naser Disa SFC*
*For the 2nd respondent - Steven Thiru; M/s Shook Lin & Bok*

*Reported by Izzaty Izzuddin*

## JUDGMENT

**Faiza Tamby Chik J:**

This is an application for, *inter alia*, an order of *certiorari* and an order of *mandamus* of the decision of the Honourable Minister of Human Resources ("the 1st respondent") made on 30 July 1998 pursuant to s. 20(3) of the Industrial Relations Act 1967 ("the said Act"). The aforesaid decision of the 1st respondent was in respect of a representation of unfair dismissal made by the applicant under s. 20(1) of the said Act. The 1st respondent decided not to refer the applicant's representation to the Industrial Court for adjudication in accordance with the discretion vested in him under s. 20(3) of the said Act. Sections 20(1) and 20(3) of the said Act read as follows:

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award.

Section 20(3) Industrial Relations Act 1967 confers upon the Minister a discretionary power either to refer or not an applicant's representation to the Industrial Court. If the 1st respondent refuses to refer to the Industrial Court, it does not mean he has exceeded his jurisdiction or he has acted *ultra vires* the Act. The Supreme Court in the case *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 at p. 12 states:

> The Minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises his discretion without improper motive, the exercise of discretion must not be interfered by the court unless he has misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or his decision militiates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

I am of the view that the 1st respondent's decision not to refer the applicant's representation to the Industrial Court did not amount to an abuse of power. The Court of Appeal in the case of *Michael Lee Fook Wah v. Minister of Human Resources Malaysia* [1998] 1 MLJ 305, at p. 311 states:

> We hold that, the very fact that the Minister did not refer *per se* any particular trade dispute, does not necessarily mean that the Minister has abused his discretion. It is for him to be satisfied that it is a fit and proper case to refer to the Industrial Court. An exercise of a discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided the Minister had considered every aspect of the case. On the facts and circumstances of the present case, we are satisfied that the Minister had exercised its discretion in a manner in accord with the scheme and intention of the Act, and as such the court should not interfere.

Also, the Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481 at p. 513, also commented on the Minister's discretionary power:

> Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or setting a dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. That this is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.

As always in every dispute between two parties especially between an employer and his employee there will be a dispute relating to question of facts. The Act provides for a conciliatory proceeding which should be held by the Director General of Industrial Relation where dispute arises between the two parties. If the parties fail to settle, the Director General of Industrial Relation will notify the Minister of the said failure and then the Minister will decide as to whether the representation is fit to be referred to the Industrial Court.

It is plain that even though there may be disputes of fact, the law gives the Minister the discretionary power to make a decision. There is no legal provision which states that where there is a dispute of facts, a representation must automatically be made to the Industrial Court. In the Supreme Court case of *Minister of Labour, Malaysia v. Chan Meng Yuan* [1992] 2 MLJ 337 at p. 342 the court stated that:

> On these facts, we are of the view that the Minister has acted reasonably in exercising his discretion not to refer the Respondent's representations to the Industrial Court. It certainly cannot be said that the facts point overwhelmingly in favour of a different version.

In the *Hong Leong Equipment* case, the Court of Appeal stated at p. 519 that:

> It follows from these decisions that the Minister must bear in the forefront of his mind that the Act has established a special tribunal to adjudicate upon a dispute arising from representations made under s. 20(1) of the Act, and that it is therefore no part of his function to arrive at a concluded view upon the merits of the dispute. His role is limited to ascertaining whether, on the facts and material placed before him, the representations raise serious questions of fact or of law calling for adjudication. And, as I have already said, his determination upon the question one way or the other is not conclusive.

Henceforth from the above cases it is clear that the dispute of fact or of law *per se* is not sufficient ground for the court to quash the Minister's decision. The facts must "point overwhelmingly in favour of a different version" and where it "raise serious question of facts or of law calling for adjudication."

It is observed that in the instant case, the bank ("the 2nd respondent") contended that the 1st respondent concluded that the applicant's complaint was not fit for referral to the Industrial Court. Accordingly, the 2nd respondent supports the decision of the 1st respondent.

It is common ground that the applicant was issued a letter of appointment on 30 January 1997 for the post of Senior Manager, Treasury, International Banking Group, by the 2nd respondent (see p. 66 encl. 6 ("the motion papers")). The applicant's appointment was subject to a probation clause with a probationary period. This clause reads as follows:

> The term of this contract commences on 3rd March 1997 and unless otherwise terminated expires on 2nd March 2000.
>
> Subject to the Bank being satisfied with your performance and subject further to the approval of Bank Negara Malaysia, the Immigration Department and/or the relevant authorities, at least 6 months prior to the expiry of the contract period, Southern Bank will initiate discussions with you on your future with the Bank with a view to reaching agreement on whether re-appointment is appropriate to this or another position and the terms and conditions thereof.

The applicant initially resisted the inclusion of the probation clause in his letter of appointment. However, he subsequently agreed to this clause in exchange for a much higher and more generous level of incentive bonus offered by the 2nd respondent (see p. 19, affidavit of Tan Ghee Kay affirmed on 13 April 1999 – encl. 12). This incentive bonus is set out in cl. 7 of the letter of appointment (see p. 67 of the motion papers). It therefore cannot be disputed that the probation clause was at all material times binding on the applicant in respect of his appointment with the 2nd respondent. The 2nd respondent subsequently found the applicant's job performance to be unsatisfactory. It is noted herein that it was the 2nd respondent's stand that given the applicant's seniority and qualification, he was expected to meet a certain level of competence and he was unable to do so. The 2nd respondent informed the applicant on 2 September 1997 that based on their overall assessment of the applicant's job performance, they were unable to confirm his appointment upon the expiration of the six months probationary period. His appointment was therefore terminated with effect from 3 September 1997 (see p. 107 of the motion papers).

It is noted that the applicant did not at the time dispute the 2nd respondent's reasons for terminating his appointment. This is clearly seen in his letters dated 2 September 1997, 3 September 1997 and 6 September 1997 (see pp. 38, 35 and 36, encl. 12). These letters revealed the state of mind of the applicant at the material time when his appointment was terminated. It was clear that there was an acceptance by him that his services were duly terminated because he

was unable to meet the standards of performance expected of him by the 2nd respondent. He was only concerned at the time to secure some form of financial compensation for himself particularly on account of the expenses he has incurred in relocating himself from Australia. Thereafter, the applicant leveled various allegations on the 2nd respondent (see pp. 108-124 of the motion papers). The allegations made by the applicant against the 2nd respondent were denied (see p. 20, encl. 12 at para 4). These allegations were obviously an afterthought. They were made some nineteen days after the termination of his service and subsequent to the applicant's own letters (at pp. 38, 35 and 36, encl. 12) where he made no mention of these allegations but instead accepted the 2nd respondent's reasons for the termination of his appointment. It is very pertinent to note that the applicant's only decision to make these allegations was very proximately connected to the time when he was queried by the 2nd respondent on two exorbitant telephone bills (of RM1,621.61 and RM1,291.18) that he had incurred and which the 2nd respondent had to pay on his behalf (see p. 20 and pp. 56 & 60, encl. 12). The failure of the applicant to raise these purported allegations at the earliest opportunity (*ie*, when he wrote the letters 2 September 1997, 3 September 1997 and 6 September 1997 to the 2nd respondent) was most telling. And, the proximity of the allegations to the query on excessive telephone calls by the 2nd respondent would suggest that the allegations were really a "knee jerk" reaction from the applicant in response to the 2nd respondent's query.

It is also interesting to note that the applicant lodged his complaint under s. 20(1) of the said Act on 19 September 1997 (see p. 125 of the motion papers) which was before he made the aforementioned allegations against the 2nd respondent (*ie*, on 22 September 1997). This further buttressed the argument that the allegations were an afterthought as rightly the allegations should have preceded the complaint. It is clear that the 1st respondent had the benefit of considering all the material documents referred to above when he decided not to refer the applicant's complaint to the Industrial Court. (See encl. 10, para. 5). The 1st respondent therefore duly came to the conclusion that the applicant's complaint ought not to be referred to the Industrial Court. The 1st respondent's reasons for his decisions are found at p. 127 of the motion papers, and they read as follows:

(i) Perayu telah tidak disahkan dalam jawatannya dan ditamatkan perkhidmatannya pada akhir tempoh percubaan kerana prestasi kerja yang tidak memuaskan.

(ii) Tempoh percubaan 6 bulan merupakan salah satu syarat dalam perlantikan perayu oleh pihak majikan.

In the instant case there was no evidence to show that the 1st respondent had considered irrelevant facts in arriving at his decision. Therefore there was no ground to quash his decision. The 1st respondent's affidavit clearly shows that he had acted correctly and not exceeded his jurisdiction in considering the relevant facts in arriving at his decision. In para. 5 of the Minister's affidavit it was clearly stated that only documents tendered by both parties were studied by him and after a thorough study of these documents, the Minister was satisfied that the representation was unfit for reference to the Industrial Court. The Minister had given his reasons as stated in exh. RJR-16:

(i) Perayu telah tidak disahkan dalam jawatannya dan ditamatkan perkhidmatannya pada akhir tempoh percubaan kerana prestasi kerja yang tidak memuaskan;

(ii) Tempoh percubaan 6 bulan merupakan salah satu syarat dalam perlantikan perayu oleh pihak majikan.

It must be noted that the reasons given by the Minister were not of his own conclusions but were facts elicited from documents forwarded by the parties to the Director General of Industrial Relation. The company had clearly stated in the termination letter:

> After due consideration and based on our overall assessment of your performance, we regret to inform you that the Bank is not able to confirm your above appointment upon the expiration of your six (6) month probation period.

The termination was not done with any reference to the contract of service – exh. LAL-1 which stated in cl. 5:

> Probation: six (6) months.
>
> Clause 18
>
> Termination of Employment: Either party may terminate this contract of service by giving three (3) months notice in writing or salary *in lieu* of notice. Provided always that during the period of probation, either party may terminate this contract of service by giving to the other party twenty four (24) hours notice in writing.

The proviso to the clause clearly empowered both parties to terminate the contract of service by giving 24 hours notice.

In the case of *KC Mathews v. Kumpulan Guthrie Sdn. Bhd.* [1981] 2 MLJ 320 at p. 321, the Federal Court agreed to the statement of Das Gupta J in *Express Newspapers Ltd. v. Labour Court & Anor*. where it was stated:

> This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the service of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

It is clear from the above quotation that our Federal Court has accepted the principle applied in *Empress Newspaper Ltd.*:

> At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory.

I am of the opinion that this principle is clearly applicable to the instant case and I hereby adopt it. There is no serious dispute of fact or of law which requires a reference to the Industrial Court.

In an application for judicial review of the exercise of the ministerial discretion under s. 20(3) of the said Act, the following salutary words of the Court of Appeal in the case of *Michael Lee Fook Wah v. Minister of Human Resources* [1998] 1 MLJ 305 must be borne in mind:

> In an application for an order of *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. Furthermore, the law does not require the first respondent to refer every matter to the Industrial Court. Section 20(3) of the Act confers a discretion on the first respondent whether to refer a complaint to the Industrial Court or not, which will depend on the facts and circumstances of each case. The court will only interfere when it can be shown that the discretion was exercised unlawfully. A negative act, such as not referring the complaint to the Industrial Court, is equally an exercise of discretion.

It is important therefore that this application is not converted into an appeal on the merits of the 1st respondent's decision not to refer the applicant's representation to the Industrial Court. A perusal of the grounds put forward by the applicant (see pp. 44-47 of the motion papers) immediately reveals that the merits of the 1st respondent's decision was being challenged as if this was

an appeal. This is obviously not permissible as it crosses the boundaries of the curial jurisdiction of the High Court. I come to the conclusion that the 1st respondent correctly recognised that it was the 2nd respondent's prerogative, as an employer, to assess and determine the standard of performance of the applicant *vis-a-vis* the expected level of performance by the 2nd respondent. Further, it was also clear that the applicant did not immediately protest when he was terminated for his poor performance and his later allegations were afterthoughts. Thus, the 1st respondent cannot be faulted for exercising his discretion against the applicant and he certainly did not exercise his discretion unlawfully. The nature of the discretion vested in the 1st respondent under s. 20(3) of the said Act may be culled from the following words in the provision, "... the Minister may, if he thinks fit, refer the representation to the court ...". It is a very subjective discretion which should not be easily impugned or questioned by the court. Authority for this proposition is found in the Federal Court case of *National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour & Manpower* [1980] 2 MLJ 189 at p. 190 where Raja Azlan Shah CJ (Malaya) (as DYMM then was) said:

> This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular cause of action within the scope of the discretionary power. It is the exercise by him of the discretion vested in him, not in the courts, that we are here required to review, and when his action is challenged in the courts for alleged abuse of discretion, we are obliged to resist any temptation to convert our jurisdiction to review into a reconsideration of the merits as if on appeal.
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> ...

And at p. 191 Raja Azlan Shah CJ (Malaya) (as DYMM then was) said:

> In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient. The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. These words taken from the speech of Lord Diplock in the *Tameside* case, (*supra*, p. 695) reflect the truism that those in whom discretionary power is vested have, to a greater or lesser extent, a range of options at their disposal. As we have said earlier in this judgment, we must guard against any tendency to equate the distinct process of mere review with an unarticulated opinion that having investigated the facts we are in a better position to adjudicate upon the merits. That is not our function. It is not for us to say what shall or shall not be done in this special area of delegated jurisdiction. Our duty is only to see that the matter in hand has been determined by the Minister in accordance with the policy and object of the Act.

In *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 at p. 10, the Supreme Court alluded to the ministerial discretion under s. 20(3) of the said Act and posited the following principles of law:

> There is no question that the power of the minister under s. 20(3) of the Act is wide and the language used by the legislature would seem to confer on the minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case provided of course he has acted *bona fide*, that is without any improper motive, and he has not taken into account extraneous or irrelevant matters. He had an unfettered discretion but should not be exercised so as to frustrate the object of the statute itself.

The exercise of the discretion by the 1st respondent not to refer the applicant's representation was not a usurpation of powers of the Industrial Court. The 1st respondent rightly deferred to the 2nd respondent's evaluation of the job performance of the applicant and noted that the applicant had accepted a six (6) months probationary period for the purposes of the evaluation. In addition to that, the 1st respondent also had the benefit of the applicant's letters to the 2nd respondent post his termination, which clearly showed that the applicant at the material time accepted that his termination was on the grounds of his poor performance. This was therefore a *bona fide* exercise of the discretion under s. 20(3) of the said Act by the 1st respondent. It is therefore obvious that there was sufficient material before the 1st respondent for him to decide in the way he did. The facts placed before him, both by the applicant and the 2nd respondent, impelled him to take the view that the applicant had been dismissed for his poor performance and that the applicant acquiesced to his dismissal on that ground. Thus, the issue of whether or not the applicant was a poor performer was no longer of any relevant. Further, the 1st respondent also correctly considered and discarded the belated allegations hurled by the applicant against the 2nd respondent. These afterthoughts were also placed before the 1st respondent when he made his decision against referral. There are three basic principles of Administrative Law that apply here to support the exercise of the ministerial discretion in the instant case, which was clearly founded on all the relevant facts of the case.

(a) First, the decision of the 1st respondent based on the exercise of the discretion under s. 20(3) of the said Act is to be upheld if all the relevant facts do not point overwhelmingly in favour of a different decision (*ie*, in this case, to refer the complaint to the Industrial Court). This principle of law was laid down by the Supreme Court in *Minister of Labour, Malaysia v. Chan Meng Yuen & Anor*. [1992] 2 MLJ 337 at p. 342 where Harun Hashim SCJ said:

> On these facts, we are of the view that the Minister acted reasonably in exercising his discretion not to refer the respondent's representations to the Industrial Court. It certainly cannot be said that the facts point overwhelmingly in favour of a different decision.

(b) Secondly, given that the 1st respondent had the benefit of all the relevant facts in this case, he had a range of options at his disposal in coming to his decision. He considered the 2nd respondent's stand in the matter as well as the allegations made by the applicant and made the decision that this was not a fit and proper case for referral. He was therefore acting within the parameters of his discretion. It therefore cannot be said that he would have come to a different decision on the material available to him. The court should therefore not impugn his decision just because he did not decide to refer the matter to the Industrial Court. In this regard, the English Appeal Court case of *Regina v. Boundary Commission for England ex p Foot and Others* [1983] 1 QB 600 at pp. 626-627 is relevant and the following statement by Sir John Donaldson MR may be noted:

> In the present case, it has not been submitted that the commission have exceeded or are about to exceed the letter of their statutory powers. The complaint is more that they have unreasonably exercised or failed to exercise the various discretions conferred on them by statute. This submission necessitates a brief consideration of the meaning of "reasonableness" in this context.
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> As Professor H.W.R. Wade says in *Wade, Administrative Law*, 5th edn. [1982], p. 362:
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> > The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.
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> What then is this objective standard? The *locus classicus* on the subject is a passage from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, 230, in which he stated what has become known as "the *Wednesbury* principle." Mr. Williams expressly accepted that his principle applies so as to govern and limit the powers of the court to intervene in regard to the activities of the commission. We need not cite the

passage from Lord Greene's judgment verbatim. For present purposes it will suffice to say that the *Wednesbury* principle would or might in our opinion entitle the court to intervene if it was satisfied that the commission had misdirected themselves in law, or had failed to consider matters which they were bound to consider or had taken into consideration matters which they should not have considered. It would not, however, entitle it to intervene merely because it considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on the ground of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations in the courts must thus be a heavy one, which by its very nature may be difficult to discharge.

(c) Thirdly, even assuming, without concluding that the 1st respondent made a mistake, then with the benefit of all the relevant facts of the case, the decision of the 1st respondent cannot be challenged merely because he made a mistake. Although the 1st respondent here cannot be said to have made a mistake, nevertheless even if he did, that alone is not sufficient for judicial review purposes. This position was made abundantly clear in the House of Lords case of *R v. Independent Television Commission, ex p TSW Broadcasting Limited* [1996] JR 185 at p. 192 by Lord Templeman who said:

Judicial review does not issue merely because a decision maker has made a mistake and it is not permissible to probe the advice received by the decision maker or to require particulars or administer interrogatories or, as Mr. Pollock on behalf of T.S.W. suggested to cross-examine, in order to discover the existence of a mistake by the decision maker or the advisers of the decision makers. An applicant for judicial review must show more than a mistake on the part of the decision maker or his advisers. Where a decision is made in good faith following a proper procedure and as a result of conscientious consideration, an applicant for judicial review is not entitled to relief save on the grounds established by Lord Greene M.R. in *Associated Provincial Picturehouses Limited v. Wednesbury Corporation* [1948] 1 KB 223, 229:

It is true the discretion must be exercised reasonably. Now, what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters

> which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority ... that is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all these things run into one another.

It is observed that the applicant now challenged the basis for his dismissal on the grounds of poor performance by complaining that there was no performance appraisal and/or complaints about his performance by the 2nd respondent, it cannot be disputed that the applicant was holding a senior management position and he was expected to know the standard of job performance required of him. He therefore cannot plead or seek refuge in his purported ignorance of what was expected from him by the 2nd respondent. This is a trite principle of Employment Law in cases concerning poor performance of senior employees. The principle was put as follows by Sir John Donaldson who in *James v. Waltham Holy Cross UDC* [1972] ICR 398 said:

> In the field of capability similar problems frequently arise. If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business.

The 1st respondent was not legally obliged to consider whether or not there was a performance appraisal of the applicant by the 2nd respondent or even if the 2nd respondent had made any prior complaints about his performance. Suffice it that the 1st respondent was aware that the applicant was a senior management employee and, in law, the 1st respondent was entitled to conclude that the 2nd respondent did not need expressly warn him or complain about his poor performance prior to dismissing him. In *Littlewoods Organisation Ltd. v. Egenti* [1976] ICR 516 at p. 517, the Employment Appeal Tribunal held:

On the employers' appeal:

Held, allowing the appeal, that the strict requirements for procedures to be taken by employers before dismissing an employee for misconduct as a disciplinary measure did not necessarily apply to dismissal for incompetence; that where an employee was so incompetent that a warning was unlikely to result in an improvement in his work no warning was necessary and the correct test was whether the overall result was a fair one; that accordingly the industrial tribunal had erred in holding that because there was no specific warning of dismissal the dismissal was necessarily unfair and the case would be remitted to the industrial tribunal for further consideration.

On the point that the applicant had sought to challenge the 1st respondent's decision on the ground that he failed to appreciate that the applicant as a probationer had security of tenure in his appointment and that he could not be dismissed without due cause. It would appear that the applicant was here relying on the Court of Appeal case of *Khaliah bte Abbas v. Pesaka Capital Corporation Sdn. Bhd.* [1997] 3 CLJ 827; [1997] 1 MLJ 376 where it was held:

Held, allowing the appeal:

Although the word 'probation' or 'probationary' was not found in the definition of workman in s. 2 of the Act, the word 'apprentice' was mentioned in the section and an apprentice would normally be a probationer. Therefore, employees on probation would come within the purview of s. 20(1) of the Act and the Industrial Court would have jurisdiction to hear and determine whether the dismissal of the appellant was with just cause or excuse.

It must be noted that the applicant's reliance on *Khaliah bte Abbas's* case is misplaced. The Court of Appeal in that case did not consider the earlier Federal Court decision of *K.C. Mathews v. Kumpulan Guthrie Sdn. Bhd.* [1981] 1 CLJ 40b; [1981] 2 MLJ 320 which confirmed the position of probationers, as set out in the Indian Supreme Court case of *Express Newspapers Ltd. v. Labour Court & Anor.* AIR [1964] SC 806, where Das Gupta J held:

This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired – except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.

Therefore in the instant case at the end of the applicant's probationary period, it was open to the 2nd respondent to either continue or discontinue the services of the applicant. The applicant, by virtue of being a probationer, had no say in the matter and the 2nd respondent, as the employer, was fully entitled to terminate his services upon their evaluation that he did not perform his job functions satisfactorily. If it were otherwise, there would be no distinction between probationary employment and permanent employment. The decision of the Court of Appeal in *Khaliah bte Abbas's* case was given *per in curiam*. In *Khaliah bte Abbas's* case the Court of Appeal considered the question of whether a probationer falls under the purview of s. 20 of the Act.

In the instant case, the 1st respondent's decision not to refer the complaint was a proper exercise of his discretion under s. 20(3) of the said Act. He had acted reasonably in exercising his discretion. Wade and Fosythe, *Administrative Law* (7th edn.) at p. 399 said:

> The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has a genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion.

For these reasons I dismissed the application in encl. 6 with costs.